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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I.

In response to our contention that this Court's decisions in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), should not be extended to the pretrial context, respondent argues broadly that those decisions require the use of presumptions of vindictiveness and prophylactic rules throughout all stages of a criminal prosecution. In respondent's view, the "policies" of *Pearce* and *Perry* require that a presumption and prophylactic rule apply "whenever a realistic likelihood of vindictiveness inheres in a given situation" (Br. 9).

a. Little support for respondent's argument can be found in either the holdings or the language of *Pearce* and *Perry*. Not only did both cases concern situations in which the defendant was exposed to more severe punishment after he had had his initial conviction set aside, but the Court carefully described its holdings in terms of due process requirements at the post-conviction stage. *E.g.*, *Pearce*, *supra*, 395 U.S. at 713 ("When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered * * *"); *id.* at 725-726 ("Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial"); *Perry*, *supra*, 417 U.S. at 28-29 ("* * * it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him"). Moreover, the Court in those cases was confronted with situations in which a vindictive or retaliatory motive was plainly the most likely explanation for the increased penalty exposure, and, indeed, in which no alternative, legitimate explanation was tendered.

Not only has the Court never intimated that presumptions of vindictiveness have any proper role to play in the pretrial context, but it has refused to find due process violations in subsequent cases in which the exercise of a pretrial right has resulted in increased penalty exposure for the defendant—even, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), where the increase in charges was concededly a retaliatory response to the defendant's refusal to plead guilty. Accordingly, general statements in *Pearce* and *Perry* about burdening procedural rights do not assist respondent here.[1] As Chief

[1] See *Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978) ("not every burden on the exercise of a constitutional right, and not every pressure * * * to waive such a right, is invalid"); *Bordenkircher*, *supra*, 434 U.S. at 363 ("the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a

Justice Marshall observed long ago, "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). This concept has particular force in construing the requirements of the Due Process Clause. As this Court noted in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979), "due process is flexible" and depends on "the particular situation." See also *Moyer* v. *Peabody*, 212 U.S. 78, 84 (1909) (Holmes, J.): "due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." For the reasons that we have explained in our opening brief, the circumstances and the necessities of the pretrial context are such that the rules prescribed in *Perry* and *Pearce* should not be applied.

b. Respondent nonetheless contends (Br. 21) that our submission concerning the limits of *Pearce* and *Perry* "is unprecedented in federal case law." This assertion ignores decisions of this Court such as *Corbitt* and *Bordenkircher*, which have emphasized the limits of the rules set forth in *Pearce* and *Perry* and have refused to apply them to government action potentially affecting the exercise of pretrial procedural rights. It is true, of course, that many lower courts have extended *Pearce* and *Perry* far beyond their intended ambit. See our opening brief at 22-23 n.8. Those courts have adopted the view that the assertion by a defendant of nearly any right—under the Constitution, federal statute, or procedural rule—is sufficient to immunize the defendant from modifications of charges at the pretrial stage unless the district court conducts a hearing on the prosecutor's motives at which the prosecutor sustains a weighty burden of persuasion on the issue of good faith. These cases are not persuasive

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defendant might be deterred from the exercise of a legal right, * * * but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction").

authority, however, because none of them even considers or discusses the fundamental question whether, in light of *Bordenkircher* and *Corbitt*, *Pearce* and *Perry* should be extended to the pretrial stage. These courts have simply *assumed* that prophylactic rules intended to keep the "avenues of appellate review of criminal convictions * * * free of unreasoned distinctions" (*Perry*, *supra*, 417 U.S. at 25 n.4) should be extended to increases in charges at the pretrial stage.

The first federal court decision to come to grips with the question whether *Pearce* and *Perry* apply at the pretrial stage is *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc). In that case, the judges of the court of appeals were deeply divided; the dissenting judges, whose opinions we have quoted in our opening brief, provided cogent reasons for declining to extend *Pearce* and *Perry* to this context. Later, the New Mexico Supreme Court agreed with the dissenting judges in *Andrews* and adopted the analysis that we present here. *State* v. *Stevens*, 633 P.2d 1225 (1981). The most recent decision of a court of appeals to consider this question also concludes that *Pearce* and *Perry* have no application at the pretrial stage. See *United States* v. *Ruppel*, 666 F.2d 261, 266-267 (5th Cir. 1982):

> Ruppel contends that his decision to plead not guilty and stand trial on the counts contained in the initial indictment was the exercise of a procedural right—the right to a trial by jury—and that his due process rights were violated when the Government indicted him for additional crimes arising out of the same transactions upon which the first indictment was based. We disagree with the appellant's reading of *Pearce* and *Blackledge*.
>
> The exercise of "some procedural right" by a defendant during his prosecution—such as electing to stand trial before a jury—is by itself insufficient to place on the prosecutor the burden of demonstrating the absence of vindictiveness in his subsequent acts.

The Fifth Circuit explained that due process violations do not arise from action that discourages the exercise of "some procedural right," but from retaliation against the accused for "lawfully attacking his conviction" (666 F.2d at 266-267). The Fifth Circuit also expressly rejected the reasoning of the court of appeals in the present case (*id.* at 267 n.3):

> We recognize that at least two United States courts of appeals have applied *Pearce* and *Blackledge* to prevent the government from adding additional charges against a federal criminal defendant after he has elected a trial by jury prior to a conviction. See *United States* v. *Goodwin*, 637 F.2d 250 (4th Cir. 1981) * * *; *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976). We believe, however, that the rationale of the Ninth Circuit in *Ruesga-Martinez* has been substantially undermined by the Supreme Court's decision in *Bordenkircher* v. *Hayes* * * *. We also are of the opinion that the decision of the Fourth Circuit in *Goodwin* may not be squared with the Supreme Court's teachings in *Bordenkircher*. Accordingly, we expressly decline to follow either of these decisions.

c. "Recognizing the interest of the State in efficient criminal procedure" (*Corbitt*, *supra*, 439 U.S. at 220 n.9), this Court has refused to extend concepts of "vindictiveness" in a manner that would seriously interfere with criminal prosecutions in state and federal court. The Court has given great weight to "practical considerations" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27 n.13 (1973)), and has declined to "interfere" with functions committed to "discretion" in the criminal justice system "in a manner more intrusive than contemplated by *Pearce*" (*id.* at 29 n.15).

Respondent's brief in this Court leaves no room to doubt that the rule that he advocates would clash with these precepts. Respondent asserts that, due to the "volatile nature of the pretrial stage" (Br. 23) and the "ad-

mittedly frequent occurrence" of "confrontation between the defense and prosecution" (*id.* at 24-25) which triggers claims of prosecutorial "vindictiveness," it is essential to conduct a hearing to sift the circumstances and to determine whether a trial on increased charges may proceed. Even a criminal case such as the present one, which in ordinary circumstances could be tried and disposed of in a few days, would be held in abeyance to conduct a far-reaching inquiry into the prosecutor's reasons for increasing charges (Br. 21):

> Relevant to this inquiry are several factors including the nature of the right asserted by the defendant, the prosecutor's knowledge, the nature and timing of the response by the prosecutor, his incentive to discourage the assertion of the defendant's rights, and the institutional interests that may be relevant.

Not content with this catalogue of subjects for judicial inquiry, respondent also urges that, once the prosecutor explains his exercise of prosecutorial discretion, that explanation must be stringently examined to determine the extent to which it rests on recent events, the extent to which the prosecutor's information was available at an earlier time, and the competence or negligence of the prosecutor in failing to act at an earlier time (Br. 32-40). Respondent also observes (Br. 26) that "the assessment of a reasonable likelihood of vindictiveness is not susceptible to bright line analysis, and necessarily rests on the totality of the circumstances in each case." Moreover, in respondent's view, the "mere difficulty of its application does not justify the abandonment of a prophylactic rule * * *" (*ibid.*).

That, we submit, states the proposition in reverse. This Court has never recognized a prophylactic rule of the kind advocated by respondent, and the "difficulty of its application" is a weighty reason for rejecting such a rule. Indeed, it is no exaggeration to observe that, if state and federal courts were required to conduct pre-

liminary trials of the kind suggested by respondent to probe the prosecutor's frame of mind and all of the circumstances of each case, together with "the institutional interests that may be relevant," there would be little time left for trial of such cases on the merits. And prosecutors, faced with the danger of becoming embroiled in such protracted and burdensome proceedings focusing on their discretionary charging decisions, would often feel constrained to press against a defendant, at the very outset, the most severe and numerous criminal charges that could be sustained by the evidence.[2]

d. Respondent's assertion that the presumption of impermissible vindictiveness should be extended to the pretrial stage rests on the premise that prosecutors have a considerable interest in deterring the exercise of pretrial procedural rights (Br. 16-18). Respondent argues (*id.* at 17) that prosecutors have a "personal stake" in assuring that "time and effort" are not needlessly consumed;

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[2] Respondent apparently has no objection to this consequence. In his view, bringing the "most severe charges possible at the outset of the case" is a manifestation of "sound prosecutorial policy" (Br. 25). While that line of argument may be tactically advantageous to respondent in the present posture of this particular case, it is clear that the result that he endorses would be contrary to the interests of criminal defendants as a class. See *Colten* v. *Kentucky*, 407 U.S. 104, 119 (1972). Criminal defendants would suffer serious disadvantages if prosecutors were impelled to bring the most severe charges possible at the outset of every case in order to avoid the danger of later becoming embroiled in a retaliation controversy. U.S. Department of Justice, *Principles of Federal Prosecution* (1980), cited by respondent, does not suggest that prosecutors should behave as respondent proposes. See *id.* at 16-19, stressing the importance of exercising sound prosecutorial discretion in selecting charges that are appropriate for the particular defendant. As that guidebook points out, "it ordinarily should not be necessary to charge a person with every offense for which he may technically be liable * * *. What is important is that the person be charged in such a manner that, if he is convicted, the court may impose an appropriate sentence. The phrase 'all the circumstances of the case' is intended to include any factors that may be relevant to the sentencing decision." *Id.* at 18. See also *id.* at 7-11.

therefore, prosecutors will be inclined to take action that has the purpose and effect of discouraging the exercise of procedural rights that may lead to the unnecessary "expenditure of prosecutorial resources" (*ibid.*). Respondent also states (Br. 18) that "[t]hese costs represent definite institutional interests to which the prosecutor is highly sensitive."

By this reasoning, of course, an increase in charges following the making of almost any contested motion at the pre-trial stage of a criminal case would be sufficient to generate a claim that there is an "appearance of vindictiveness" and to necessitate a hearing. As we have explained in our opening brief (at 24-39), however, there is a fundamental difference between increases in charges that occur at the pretrial stage of a criminal case and increases in charges that occur after a final judgment of conviction. That difference has two dimensions.

First, in contrast to the post-conviction context, a pretrial revision of charges or increase in penalty exposure is more likely to have a legitimate than a "vindictive" motivation. The teaching of common experience, in both civil and criminal litigation, is that pleadings frequently require amendment or modification at the pretrial stage to take account of new information or improved analysis of the facts. Since amended complaints and superseding indictments are commonplace at the pretrial stage, and since diligent attorneys pursue factual research and analysis up until the eve of trial, the explanation for increased charges in most cases is simply that new facts, or a more thorough evaluation of the facts, requires an amendment of the charges.

By contrast, an increase in charges that occurs after the case has been tried—and after all of the facts presumably have been made known to and analyzed by the prosecution and sentencing judge—is an unusual circumstance that may be thought to require an explanation. In *Pearce*, the Court found a presumption of vindictiveness and a prophylactic rule to be required because, in

at least one of the cases before it, "the conclusion [was] inescapable that the State of Alabama is punishing petitioner * * * for his having exercised his post-conviction right of review * * *" (395 U.S. at 726). Similarly, in *Perry*, the prosecutor substantially increased the charges against the accused following the completion of trial and immediately after the filing of a notice of appeal, and tendered no legitimate explanation for that action (417 U.S. at 23). In those post-trial situations, there was a "real threat of vindictiveness" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973)). By contrast, the routine modification of charges at the pretrial stage of a criminal prosecution does not reasonably warrant a presumption that the prosecutor is retaliating against the exercise of a procedural right rather than responding to new information concerning the accused.

Second, the exercise of a procedural right at the pretrial stage of a criminal case—even one that is contested by the prosecution—is such a recurring and commonplace event that it is wholly implausible to presume that it would provoke a punitive or retaliatory response. In nearly every criminal prosecution, even those in which a guilty plea is ultimately entered, the accused routinely exercises a wide variety of procedural rights. The prosecutor is far more likely to be astounded by a failure to exercise procedural rights than to be provoked to retaliation by their exercise. Since pretrial exercises of procedural rights are simply "par for the course" (at least outside the context of plea bargaining as in *Bordenkircher*), they are generally not likely to anger the prosecutor. In *Pearce* and *Perry*, by contrast, the defendants' exercise of their rights required the court and prosecutor to "do over" what they thought they "had already done correctly" (*Colten* v. *Kentucky*, 407 U.S. 104, 117 (1972))—a circumstance more likely to prompt a vindictive response.

Finally, even if, in some cases, respondent's speculations about prosecutorial motivation at the pretrial stage were well founded, there still would be no basis for finding a due process violation. Respondent argues that prosecutors may be motivated to obtain increased charges for the purpose, and with the actual effect, of discouraging defendants generally from exercising pretrial rights that impose costs on the criminal justice system. We know of no decision of this Court that suggests that it is improper for a prosecutor to attempt to minimize "the expenditure of prosecutorial resources," to avoid "definite costs * * * in terms of both time and money," or to achieve "savings of resources" through the exercise of charging discretion at the pretrial stage (see Resp. Br. 17-18 & n.9). If criminal charges are supported by the evidence, the prosecutor's consideration of administrative factors of this kind would serve "the interest of the State in efficient criminal procedure" (*Corbitt*, *supra*, 439 U.S. at 220 n.9) and could not be "equated with impermissible punishment" (*id.* at 223).

Indeed, *Corbitt* and *Bordenkircher* stand as a fortiori precedents against respondent's vindictiveness theory. If the severity of punishment may be made to depend on the defendant's willingness to waive the most fundamental of all pretrial procedural rights—the right to insist on a trial—then it is difficult to conceive how encouraging the waiver of other lesser rights, such as the right to be tried in one forum rather than another, could be characterized as improper retaliation.[3] So long as the prosecutor selects charges that are both supported by the evidence and are calculated to increase efficiency in the criminal justice system, his conduct can "not be deemed a needless or arbitrary burden on the defendant's constitutional rights" (*Corbitt*, *supra*, 439 U.S. at 223).

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[3] "There is no question, of course, that a person who is accused of a crime may receive a fair trial before a magistrate or judge." *Ludwig* v. *Massachusetts*, 427 U.S. 618, 627 n.3 (1976).

e. Respondent also argues (Br. 26, 30) that this Court's decisions in *Bordenkircher* and *Corbitt* are irrelevant here because they involved "plea bargaining." In respondent's view, those cases set forth special rules for plea bargaining, a context in which "prosecutorial vindictiveness has been condoned."

We readily concede that this case differs from *Bordenkircher*. There the increased charges were obtained for the express purpose of responding to the defendant's refusal to plead guilty to the original charges; nevertheless, because the Court found that the prosecutor's effort to secure a guilty plea served "legitimate" state interests in conserving prosecutorial and judicial resources (434 U.S. at 364), it concluded that the increased charges were not impermissibly vindictive in violation of the defendant's due process rights. In the instant case, by contrast, respondent was never threatened in any way with regard to the exercise of his jury trial rights, and there is no suggestion that the increased charges were in any way a response to, let alone an effort to retaliate against, his exercise of that right.[4] It would be ironic indeed if a

[4] Respondent's effort to distinguish *Bordenkircher* also rests on a mischaracterization of the facts in the present case. Plea negotiations did in fact take place in this case (J.A. 26), and the charges against respondent were increased after plea negotiations failed. In that respect this case is comparable to *Bordenkircher*. Although it is true that respondent was not explicitly "threatened" with increased charges by the original prosecutor, respondent necessarily assumed the risk that further processing of his case would lead to an alteration of charges. When a plea offer is rejected, the defendant runs the risk that a reevaluation of charges will take place in light of additional factual investigation, and that the sentencing court will impose the maximum penalty provided by law in the event of a conviction. The Constitution "does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision." *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 226. Respondent received no assurance of any kind that, after he insisted that his case be transferred to the district court for trial by jury, the successor prosecutor would not supplement the factual investigation of his inexperienced predecessor.

rule designed to protect defendants against retaliatory responses were held applicable, as respondent suggests, precisely because there is no showing of a responsive reaction to the exercise of a right.

While respondent's proposed distinction of *Bordenkircher* is topsy-turvy logic, it is no distinction at all in comparing this case to *Corbitt*, where this Court extended the principle of *Bordenkircher* beyond the plea bargaining context. In *Corbitt* the Court approved a statutory scheme that authorized the sentencing court to impose different penalties on criminal defendants depending on whether they elected to stand trial or pleaded non vult. The Court premised this holding on the state's "legitimate interest" (439 U.S. at 222) in obtaining a waiver of constitutional rights as part of the process of promoting an efficient criminal justice system. To the extent that the state imposed differential penalties to obtain these "substantial benefits," its action could not be characterized as "needless or arbitrary" (*id.* at 223). Contrary to respondent's contention, the Court reached this conclusion in *Corbitt* without reliance on the existence of plea bargaining in the particular case before it. See *id.* at 221 n.10 ("escalation of the charges after the failure of plea bargaining * * * is not present here; and we need not rely on this aspect of the *Bordenkircher* decision"). See also *id.* at 227 (Stewart, J., concurring) ("It seems to me that there is a vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case"); *id.* at 231 (Stevens, J., dissenting) ("Nor is this statutory scheme the equivalent of a plea bargain negotiated between defense counsel and the prosecutor").

In short, even if this Court were to accept respondent's submission that pretrial charging decisions frequently have the purpose and effect of limiting "expenditure of prosecutorial resources" by deterring other defendants from exercising similar rights (Br. 17), there

still would be no basis for adopting a presumption of improper "vindictiveness" at the pretrial stage. So long as the defendant is not "subjected to unwarranted charges" (*Corbitt, supra*, 439 U.S. at 223), government action aimed at the conservation of scarce resources in the criminal justice system is not "vindictive" or malicious in nature. This is true regardless of the scope of plea bargaining that takes place in a particular case, as *Corbitt* clearly establishes.

II.

We have maintained in our opening brief (at 39-43) that, even if this Court were to disagree with our submission that a presumption of impermissible vindictiveness should never apply at the pretrial stage, such a presumption should be employed only in those circumstances in which improper retaliation appears to be the likeliest explanation for revised charges. We argued that there is no genuine danger of vindictiveness on the facts of this record that would justify the adoption of a presumption of vindictiveness. In support of that submission, we pointed out that respondent has never alleged the existence of actual vindictiveness, and the court of appeals explicitly found that "the prosecutor did not act with actual vindictiveness in seeking a felony indictment" (Pet. App. 4a). The original charges were preferred by a police officer and initially handled by a temporary prosecutor with limited authority. Neither of the prosecutors who participated in this case ever threatened respondent with an increase in charges or took other action to discourage him from exercising his right to trial by jury rather than by magistrate, and there is not the slightest indication that either prosecutor regarded his request as anything other than a routine exercise of a procedural right. Moreover, the increase in charges did not supervene immediately upon the request for a jury trial. To the contrary, charges were increased approximately six weeks after respondent requested a trial by jury (Pet.

App. 19a). Finally, the record reveals no reason why the successor prosecutor would regard this case as being different from the many other cases assigned to him in which defendants requested a trial by jury. See *Colten* v. *Kentucky, supra*, 407 U.S. at 117.

In answer to our submission, respondent asserts (Br. 20) that the increased charges here are "appropriately suspect" because the successor prosecutor "substituted" more serious charges based on the same conduct underlying the original charges. He claims that there is a "crucial distinction" between "the addition of charges as contrasted with the substitution of charges" (*id.* at 19), and that even though a presumption of vindictiveness need not arise when charges are added, it should when they are substituted (*id.* at 20). Respondent buttresses his argument by attacking the performance of the original prosecutor. In respondent's view, she followed "improper prosecutorial procedure" when she failed to obtain increased charges at the outset, and thus was guilty of "exceedingly poor performance of the prosecutorial function" (*id.* at 26). Respondent characterizes the original prosecutor's failure to obtain increased charges against him before he demanded a trial by jury as a "grossly inadequate" and "ill advised" performance of duty (*id.* at 39, 40).

In determining whether there is a realistic likelihood of vindictiveness, however, it is of little consequence whether the prosecutor's action entails the addition of more numerous charges or the substitution of more severe charges. Both charging techniques have an equal capacity to "up the ante." Whether one technique is used rather than the other sheds no light on the prosecutor's frame of mind or the justifications for his conduct. As the facts of this case show, receipt by the prosecutor of additional information, and further evaluation of that information, may warrant the conclusion that a more severe charge should be substituted for a lesser charge. Likewise, continuing factual evaluation can lead to the

conclusion that the addition of charges for other related crimes is appropriate. As Judge Keith correctly observed in his panel dissent in *United States* v. *Andrews*, 612 F.2d 235, 256 (6th Cir. 1979), the distinction between added and substituted charges is "tenuous." Whether the prosecutor "substituted or added the charge is not very important." *Ibid.*

Moreover, respondent's repeated protestations that the original prosecutor acted negligently in failing to prefer increased charges against him before he demanded a trial by jury serves only to highlight the weakness of his claim that there is a genuine likelihood of vindictiveness in this setting. If, as respondent concedes, he should have been charged more severely at the outset, and if it was a "grossly inadequate" performance of duty to fail to do so, then it is quite clear that the successor prosecutor's decision to increase the charges against respondent was a diligent performance of duty intended to correct a serious mistake. Respondent's acknowledgment that he should have been charged with a felony from the outset is in itself sufficient to rebut the suggestion that the increase in charges here at issue was the product of malicious or vindictive motivation.[5]

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[5] Respondent argues (Br. 7, 19), without supporting authority, that the prosecutor's interest in substituting more severe charges here is "diminished" because a decision originally was made to charge him with a misdemeanor. However, police officers and prosecutors are human beings, not infallible high-speed computers, and it is inevitable that errors will sometimes be made in the initial charging decision. As respondent has conceded, the lenient charges originally lodged by Officer Morrissette were wholly inappropriate in light of his conduct and prior criminal record. The government plainly has a substantial interest in correcting erroneous charging decisions of this kind. "To hold otherwise would unduly restrict the prosecuting attorney from making an independent examination of the criminal conduct and substituting his formulation of the appropriate charges in place of the lay person's." *United States* v. *Sturgill*, 563 F.2d 307, 309-310 n.3 (6th Cir. 1977).

III.

We also have contended (Br. 44-48) that, even if the Court disagrees with our primary submission and concludes that some explanation was required by the prosecutor to justify increased charges in this case, the prosecutor completely dispelled any appearance of vindictiveness that might be thought to arise on this record by his demonstration of objective facts justifying the procurement of a felony indictment. Respondent's answer to our assertion is not that the prosecutor lacked good faith, objective grounds for increasing the charges. To the contrary, respondent agrees that the original charges were too lenient, that the original prosecutor should have taken steps to increase them, and that the successor prosecutor corrected an "exeedingly poor performance of the prosecutorial function" when he obtained enhanced charges (Br. 25-26, 39-40). Respondent's objection to the prosecutor's explanation is that it did not satisfy two arbitrarily selected standards. In respondent's view, the prosecutor was required to show that the increased charges rest on "conduct on the part of the respondent occurring subsequent to the exercise of his right to a jury trial" (Br. 32). Alternatively, respondent claims that the prosecutor failed to explain adequately why the government did not obtain enhanced charges before he exercised his procedural right (Br. 37-39).

In making these arguments, respondent completely misconceives the issue before the Court. The question is not whether the government based its charging decision on recent events, or whether the government satisfied some undefined standard of dispatch in marshalling and analyzing the facts. The question is whether the prosecutor explained his conduct in a manner that demonstrated that he had in mind legitimate considerations, rather than irrational or vindictive ones, when he obtained increased charges. As discussed in our opening brief (at 46-48), the uncontradicted evidence offered by the prosecutor in

this case clearly shows that he acted on the basis of proper considerations.

a. Respondent's initial argument (Br. 32-37) is that, after a criminal defendant exercises a procedural right at the outset of a criminal prosecution, the government may base increased charges only on events that occur subsequent to that time. On this theory, a quick demand for a trial by jury would be sufficient to ensure that the government is disabled from "upping the ante" based on its continuing investigation of the facts surrounding the crime and the defendant's background. No matter how deficient the government's initial understanding of the relevant facts might be, the assertion of some procedural right would be enough to confer this immunity. No decision of this Court has ever suggested that the exercise of a procedural right at the outset of a criminal prosecution should bar the government from modifying charges in light of continuing investigation and analysis of the facts.[6] Moreover, the better reasoned decisions of the lower courts repeatedly have held that a charge that is too lenient may be corrected in light of further investigation of the facts or an apparent oversight on the part of the original prosecutor (see our opening Brief at 45).

b. Respondent also argues (Br. 37-41) that the government is estopped to correct the unduly lenient charges against him because the government could have obtained increased charges before he demanded a trial by jury. However, this Court has never indicated that the prosecution must assemble and fully analyze all relevant information prior to some arbitrarily defined cut-off point, or that it is barred from continuing to evaluate the facts

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[6] Whatever the merits of applying such a rule to the sentencing decision of a trial judge following an appeal and retrial (*North Carolina* v. *Pearce*, *supra*, 395 U.S. at 741 (Black, J., concurring in part and dissenting in part); *id.* at 751 (White, J., concurring in part)), there is no basis for so restricting the discretion of the prosecutor at the preliminary stage of the proceeding when the need for flexibility in adjusting charges is paramount.

after a criminal defendant exercises a pretrial right. Moreover, it is perfectly understandable in the present case why the government did not obtain enhanced charges until it did.

Although respondent suggests that all of the pertinent information was "available" to the government (Br. 9) prior to the time that he exercised his procedural right, and that the "prosecution" was aware of all material information from the beginning (Br. 37-39), the record clearly shows that the relevant facts were not fully gathered and analyzed until the successor prosecutor (AUSA Norton) was assigned to the case and commenced trial preparation. There is no dispute that the original charges were filed by a police officer who had no power to obtain a felony indictment. Shortly after those charges were lodged against respondent, he fled the jurisdiction and remained absent for three years. When he finally was located in jail in Virginia and returned to Maryland for trial, an attorney temporarily assigned to the magistrate's court handled his case.[7] Her knowledge of the case was limited to the facts underlying the incident on the parkway and respondent's failure to appear for trial in 1976 (J.A. 25-26). Respondent's extensive involvement in importing and selling heroin, and his commission of perjury, were not known to the original prosecutor. As the successor prosecutor later explained to the district court (Nov. 7, 1979 Tr. 200):

> As [these facts] relate[] to Mrs. Bruce's knowledge on May 24th of that date, I suppose * * * she could

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[7] It is undisputed that the original prosecutor (an attorney from the Antitrust Division of the Department of Justice) was assigned for a two-week period to try only petty crime and misdemeanor cases in the magistrate's court. She could not obtain a felony indictment. See J.A. 25-26; Nov. 7, 1979 Tr. 196-197 ("She has absolutely no authority to file informations or to request that indictments be sought whatsoever. Her sole function is to be there in court and to prosecute the cases that are filed by law enforcement officers.").

> have found out all that information. As a matter of fact, she did not.

See also Nov. 7, 1979 Tr. 197 ("she did not know that Mr. Goodwin had committed perjury"); see also *id.* at 202-204.

In sum, all of the information relevant to the prosecutor's decision to increase charges was not gathered and analyzed until several weeks after respondent exercised his right to stand trial (Pet. App. 22a-23a, 27a-31a). It should be immaterial that the information might have been gathered and analyzed at an earlier time. As the district court explained (Pet. App. 23a): "the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time."

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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